

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

8 RENARDO ROBERTSON, et al.,

9 Plaintiffs,

10 v.

11 CATHOLIC COMMUNITY SERVICES OF
12 WESTERN WASHINGTON,

13 Defendant.

CASE NO. C19-1618 RSM

ORDER

14 **I. INTRODUCTION**

15 This matter is before the Court on the parties' dueling discovery motions. The discovery
16 dispute focuses on the discoverability of Plaintiff's medical and mental health records.
17 Defendant seeks both medical and mental health records dating back to 2010. Plaintiff argues
18 that the request is overly broad, that the medical and mental health records he has produced thus
19 far have fully satisfied his discovery obligations, and that allowing Defendant to subpoena
20 Plaintiff's treatment providers would violate his privacy rights and be an undue burden on his
21 treatment providers. Accordingly, Plaintiff seeks to quash subpoenas that Defendant has sent to
22 Plaintiff's providers. Finding that Plaintiff has placed his medical and mental health at issue, the
23 Court resolves the issues as follows.

II. BACKGROUND

Plaintiff began working for Defendant on January 28, 2013. Dkt. #1 at ¶ 16.¹ Most of the employment relationship passed amicably. In March-April 2016, however, Defendant did not appoint Plaintiff to a position he desired. *Id.* at ¶ 22. Thereafter, Plaintiff began feeling that he was being discriminated against and, after he aired his concerns in spring of 2018, retaliated against. *See generally id.* at ¶¶ 16–91. Thereafter, the relationship deteriorated until Plaintiff was laid off in the summer of 2019. *Id.* Plaintiff has brought claims for employment discrimination and retaliation, wrongful termination, and negligent infliction of emotional distress. *Id.* at ¶¶ 104–141.

Plaintiff’s allegations of emotional distress are particularly relevant to the motions at hand. Specifically, Plaintiff alleges that towards the end of 2018 he experienced “extreme stress” because of the discrimination and retaliation and was instructed by his doctor to “take several days off of work.” *Id.* at ¶ 48. At the same time, “Plaintiff began his therapy sessions for work stress, and he has been undergoing [] treatment ever since.” *Id.* Plaintiff alleges that he had to again “take several more days off of work due to the extreme stress caused by the discrimination and retaliation against him.” *Id.* at ¶ 71. The stress “became so overwhelming that he slipped into a downward spiral with depression, anxiety, and alcohol abuse and had to undergo treatment for several weeks, per doctor’s note.” *Id.* The stress continued and in July 2019, “Plaintiff’s therapist ordered him to start working half days, no more than four hours a day, due to extreme job stress.” *Id.* at ¶ 80.

Plaintiff alleges that “[a]s a result and proximate cause of Defendant’s conduct, Plaintiff[] [has] suffered injury and/or damages, for which [he is] entitled to recover actual, compensatory,

¹ Throughout, the Court cites to the docket and page numbers applied by the Court’s CM/ECF system. Where appropriate, the Court cites to numbered paragraphs or page and line numbers.

1 economic, non-economic, special, general, and/or punitive damages, in an amount to be proven
2 at trial.” *Id.* at ¶ 141. Plaintiff further prays for a judgment against Defendant “for any and all
3 forms of emotional distress [he has] experienced, including but not limited to humiliation, loss
4 of enjoyment of life, pain and suffering, personal indignity, embarrassment, fear, sadness, anger,
5 anxiety, and anguish, in amounts to be established at trial.” *Id.* at p.18, ¶ B. Plaintiff also seeks
6 “[a]ny and all other actual damages, costs, and expenses.” *Id.* at p.19, ¶ C.

7 Defendant served discovery requests on Plaintiff, two of which are relevant here:

8 INTERROGATORY NO. 6: Describe any medical doctor, psychologist,
9 psychiatrist, counselor or any other health care practitioner that has treated you
10 during the course of the last 10 years, including substance abuse (e.g. alcohol
11 abuse) treatment programs. This Interrogatory requires you to identify the name
12 and current business address, phone number, the specialty area of expertise of the
13 practitioner, and the dates of treatment.

14

15 REQUEST FOR PRODUCTION NO. 12: Please produce all records originating
16 from or concerning any treatment you received from any medical doctor,
17 psychologist, psychiatrist, therapist, counselor or any other health care
18 practitioner during the past ten (10) years, including but not limited to those
19 identified in your response to Interrogatory No. 6. **To respond to this request,**
20 **please complete all appropriate sections of, and sign and produce, the**
21 **attached Authorization for Release of Medical Records for any health care**
22 **provider responsive to this request.**

23 Dkt. #20 at 47, 56 (emphasis in original).

24 Through the course of discovery—an apparently contentious process which the parties
present in unnecessarily meticulous detail—Plaintiff produced 166 pages of records.² While
conceding that medical and mental health records are discoverable, Plaintiff redacted portions of
the documents produced. *Id.* at ¶ 4. Plaintiff indicates he has produced documents

which relate to any and all mental health conditions, substance abuse, emotional
distress, and/or any health conditions which Plaintiff alleges have been caused,

² The Court does not understand Plaintiff’s response to Interrogatory No. 6 to be a point of
contention beyond demonstrating the parties’ positions.

1 aggravated, exacerbated, worsened, contributed to, triggered, or otherwise
2 affected by Defendant or Defendant's actions, for the time period March 1, 2014
to present

3 *Id.* at 70.

4 Unsatisfied with Plaintiff's discovery responses, Defendant began the process of
5 subpoenaing the records directly from Plaintiff's treatment providers and filed its Motion to
6 Compel (Dkt. #19). Defendant's Motion sought to compel "Plaintiff to produce his medical and
7 mental health records from January 1, 2010 onward." Dkt. #19 at 7. Defendant additionally
8 sought "a judge signed order for the production of Plaintiff's medical records held by the
9 Veterans' Administration" after learning that some providers, affiliated with the Navy, would not
10 release records on an attorney-signed subpoena alone. *Id.*

11 Defendant's actions prompted Plaintiff to file his Motion to Quash. Dkt. #21. Therein,
12 Plaintiff asked that the Court quash Defendant's subpoenas and issue a protective order limiting
13 discoverable records to "the time period from March 1, 2014, to present," and then, "to records
14 relating to: (1) his mental health, including substance abuse; (2) emotional distress; and (3) any
15 health condition Plaintiff is alleging was caused, aggravated, exacerbated, worsened, triggered,
16 or otherwise affected by Defendant or Defendant's actions." *Id.* at 2.³

17 III. DISCUSSION

18 A. Discovery Generally and Requests for Production

19 Federal Rule of Civil Procedure 26 sets the broad scope of permissible discovery:

20 Unless otherwise limited by court order, the scope of discovery is as follows:
21 Parties may obtain discovery regarding any nonprivileged matter that is relevant
22 to any party's claim or defense and proportional to the needs of the case,
considering the importance of the issues at stake in the action, the amount in
controversy, the parties' relative access to relevant information, the parties'

23 ³ Plaintiff also asked that the Court stay the subpoenas pending resolution of the motions.
24 However, the subpoenas required compliance before the noting date of the motions and the
parties indicate that Plaintiff's treatment providers did not comply with the subpoenas.

resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

FED. R. CIV. P. 26(b)(1). After the 2015 amendments to Rule 26, “[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.” FED. R. CIV. P. 26, Advis. Comm. Notes for 2015 Amends. Even where evidence is relevant and proportional, the Court may limit discovery where “the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.” FED. R. CIV. P. 26(b)(2)(C)(i).

A party may issue requests for production, limited by the general scope of discovery, to other parties seeking access to documents in “the responding party’s possession, custody, or control.” FED. R. CIV. P. 34(a)(1). The responding party must produce the responsive documents or “state with specificity the grounds for objecting to the request, including the reasons” and “state whether any responsive materials are being withheld on the basis of that objection.” FED. R. CIV. P. 34(b)(2). If requested discovery is not answered, the requesting party may move for an order compelling such discovery. FED. R. CIV. P. 37(a)(1). The party that resists discovery has the burden to show why the discovery request should be denied. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975).

B. Psychotherapist-Patient Privilege

The parties appear to agree that this dispute turns on Plaintiff’s waiver of the psychotherapist-patient privilege.⁴ Where, as here, a case involves both state and federal claims,

⁴ The Court draws no distinction between Plaintiff’s mental health records and Plaintiff’s medical records in this case. Waiver of the psychotherapist-patient privilege is more limited and more importantly, Plaintiff makes clear that both types of records have been put at issue. *See* Dkt. #1 at ¶¶ 48, 71, 80 (detailing *doctor’s* instructions to take several days off of work, continuing

1 the federal law of privilege applies to both the state and federal claims. *Fitzgerald v. Cassil*, 216
2 F.R.D. 632, 634 (N.D. Cal. 2003); *see also Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455,
3 459 (N.D. Cal. 1978) (concluding that “in federal question cases where pendent state claims are
4 raised the federal common law of privileges should govern all claims of privilege raised in the
5 litigation,” at least where information sought goes to both federal and state claims). Here, the
6 records at issue are relevant to both Plaintiff’s state and federal claims and the Court applies
7 federal law of privilege.

8 Confidential communications made to a licensed psychiatrist or psychologist during the
9 course of treatment are afforded privilege protection under Federal Rule of Evidence 501. *Jaffee*
10 *v. Redmond*, 518 U.S. 1, 15 (1996). The privilege may be waived when a plaintiff seeks certain
11 emotional distress damages. *See Santelli v. Electro-Motive*, 188 F.R.D. 306, 308 (N.D. Ill.
12 1999). This is because “[f]or each item of damages, whether economic or non-economic, the
13 plaintiff must show that the damage was proximately caused by the defendant’s unlawful
14 conduct.” *Doe v. City of Chula Vista*, 196 F.R.D. 562, 568 (S.D. Cal. 1999). If there is evidence
15 to show that a plaintiff’s emotional distress may have been caused by something besides the
16 injury, fairness dictates that the defendant should be permitted access to that evidence. *See id.*

17 The Ninth Circuit has not definitively determined the circumstances that constitute a
18 waiver of the psychotherapist-patient privilege and district courts have adopted different
19 approaches. *Carrig v. Kellogg USA Inc.*, Case No. C12-837RSM, 2013 WL 392715, at *2 (W.D.
20 Wash. Jan. 30, 2013) (collecting cases and describing alternative approaches). This Court
21 generally applies the “middle ground” approach, finding waiver when the plaintiff asserts more
22 than “garden-variety” emotional distress. *See id.* at *3; *see also Ginter v. BNSF Ry. Co.*, Case

23
24 *therapy sessions for work stress, doctor’s requirement for several weeks of alcohol abuse
treatment, and therapist’s order to only work half days).*

1 No. C13-224RSM, 2014 WL 294499, at *3 (W.D. Wash. Jan. 24, 2014); *Karrani v. JetBlue*
2 *Airways Corp.*, Case No. C18-1510RSM, 2019 WL 2269818, at *2 (W.D. Wash. May 28, 2019).

3 Courts adopting the middle ground approach define “garden-variety” emotional distress
4 as “ordinary or commonplace,” that which is “simple or usual.” *Fitzgerald*, 216 F.R.D. at 637
5 (citing *Ruhlmann v. Ulster County Dep’t of Soc. Servs.*, 194 F.R.D. 445, 449 n.6 (N.D.N.Y.
6 2000)). Claims of emotional damages for humiliation, embarrassment, and anger do not waive
7 the privilege. *See Santelli*, 188 F.R.D. 306. However, waiver follows where a plaintiff alleges
8 more complex distress, including “any specific psychiatric injury or disorder, or unusually severe
9 distress.” *Jackson v. Chubb Corp.*, 193 F.R.D. 216 (D.N.J. 2000) (considering FED. R. CIV. P.
10 35(a)’s approach to independent medical examinations when a party’s physical or mental
11 condition is “in controversy”). Emotional distress damages for conditions such as anxiety and
12 depression are not recognized as “garden-variety” emotional distress claims. *Ginter*, 2014 WL
13 294499, at *3.

14 Here, there is little question that Plaintiff’s claims extend beyond “garden-variety” claims
15 for emotional distress. Plaintiff details that the stress caused by the alleged discrimination and
16 retaliation was extreme, causing him to pursue professional treatment, take days off from work,
17 spiral into “depression, anxiety, and alcohol abuse” such that he had “to undergo treatment for
18 several weeks,” and ultimately to work “no more than four hours a day.” Dkt. #1 at ¶¶ 48, 71,
19 80. Further, Plaintiff asserts broad claims for damages encompassing “actual, compensatory,
20 economic, non-economic, special, general, and/or punitive damages,” *id.* at ¶ 141, and “[a]ny and
21 all other actual damages, costs, and expenses.” *Id.* at p.19, ¶ C. Plaintiff does not advance
22 “garden-variety” emotional distress claims.

23 Likewise, Defendant details that Plaintiff’s claims themselves act as a waiver of the
24 psychotherapist-patient privilege. Dkt. #19 at 6 (noting that a Washington claim for negligent

1 infliction of emotional distress requires a plaintiff to establish emotional distress susceptible to
2 medical diagnosis and proved through medical evidence) (quoting *Kumar v. Gate Gourmet Inc.*,
3 180 Wash.2d 481, 506, 325 P.3d 193, 205 (2014)); Dkt. #19 at 6 (arguing that medical and mental
4 health records are put at issue with by federal race and retaliation claims). Plaintiff does little to
5 rebut Defendant’s arguments and certainly does not meet his burden to establish that waiver does
6 not apply here. The Court agrees that Plaintiff has waived the psychotherapist-patient privilege.

7 **C. Motion to Quash**

8 Plaintiff’s request that the Court quash Defendant’s subpoenas to his treatment providers
9 is easily disposed of.⁵ No matter the subject matter, attorneys issuing subpoenas have a duty to
10 “avoid imposing undue burden or expense on a person subject to the subpoena.” FED. R. CIV. P.
11 45(d)(1). A subpoena that subjects a person to undue burden should be quashed or modified.
12 FED. R. CIV. P. 45(d)(3). All circumstances where a party has standing to quash a subpoena
13 issued to a third party are not clear, but courts generally recognize an assertion of privilege as
14 providing standing to ask that a subpoena be quashed. *See e.g., Cal. Sportfishing Prot. Alliance*
15 *v. Chico Scrap Metal, Inc.*, 299 F.R.D. 638, 643 (E.D. Cal. 2014) (noting that the general rule is
16 that a party has standing only to protect its own privilege and that the Ninth Circuit has not
17 addressed the question).

18 Having already determined that Plaintiff has waived his psychotherapist-patient privilege,
19 the Court finds Plaintiff’s other arguments unavailing. Plaintiff complains that the subpoenas
20 “impose an undue burden and expense on nonparties.” Dkt. #21 at 7. But these arguments are
21 speculative and for the subpoenaed parties to assert. Plaintiff also argues that the subpoenas
22

23 ⁵ The parties further acknowledge that Plaintiff’s request may be moot as the dates by which the
24 subpoenas required compliance passed prior to the date on which the motions were noted for the
Court’s consideration.

1 should be quashed because Defendant did not provide Plaintiff appropriate notice. *Id.* at 9. But
2 while Plaintiff asserts baldly that he was provided “insufficient time to prepare an objection,” the
3 Court notes that Plaintiff received almost a month of notice, filed a motion to quash, and does
4 not point to any more specific prejudice. Plaintiff had a full opportunity to address the issue.

5 **D. Motion for Protective Order**

6 In contrast to a motion to quash, a party clearly has standing to seek a protective order to
7 limit discovery from a third party. *Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc.*, 231
8 F.R.D. 426, 429 (M.D. Fla. 2005). Third-party subpoenas issued pursuant to Federal Rule of
9 Civil Procedure 45 are still subject to the limitations of Rule 26. *See Nidec Corp. v. Victor Co.*
10 *of Japan*, 249 F.R.D. 575, 577 (N.D. Cal. 2007); *In Re Subpoena of DJO, LLC*, 295 F.R.D. 494,
11 497 (S.D. Cal. 2014). Accordingly, the Court may “issue an order to protect [any] party or person
12 from annoyance, embarrassment, oppression, or undue burden or expense.” FED. R. CIV. P.
13 26(c)(1). “The party seeking a protective order has the burden to demonstrate good cause, and
14 must make ‘a particular and specific demonstration of fact as distinguished from stereotypical
15 and conclusory statements’ supporting the need for a protective order.” *Auto-Owners Ins. Co.*,
16 231 F.R.D. at 429–30 (quoting *U.S. v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978)); *Rivera*
17 *v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004) (requiring demonstration of harm or
18 prejudice that will result from discovery).

19 Plaintiff seeks two main limitations on Defendant’s access to his medical and mental
20 health records. Dkt. #21 at 2. First Plaintiff seeks to redact medical conditions that he deems
21 irrelevant or off-limits.⁶ Plaintiff argues he has consciously limited “the knowing and voluntary
22

23 ⁶ Plaintiff also indicates that he redacted his home address, date of birth, and social security
24 number from the medical records he produced. Dkt. #24 at 5. Plaintiff did not provide any
contemporaneous privilege log, does not now identify a legal basis for the redactions, and does

1 waiver of his mental health records privilege under federal law [to prevent] the involuntary
2 disclosure of highly sensitive, humiliating, embarrassing, and confidential health information.”
3 Dkt. #24 at 5. Citing to an out of district magistrate decision in a pro se case, Plaintiff claims a
4 right to “redact non-responsive portions of his confidential mental health and medical records,
5 which relate to health conditions he is not putting at issue in this case.” *Id.* at 4 (citing *Tiedemann*
6 *v. Southern Health Partners Inc.*, Civ. Act. No. 4:15-cv-5075-RMG-TER, 2017 WL 445591 (D.
7 S.C. Feb. 2, 2017)). Other than mentioning medical records that were partially redacted, the
8 Court does not see *Tiedemann*’s relevance. There, the plaintiff requested medical records related
9 to himself “from August 19, 2013, through December 25, 2013,” and later sought to compel
10 production of portions which had been redacted because they were outside of plaintiff’s narrow
11 timeframe. Having already concluded that Plaintiff has waived privilege for his medical and
12 mental health records, the Court cannot agree with Plaintiff’s position.

13 Secondly, Plaintiff seeks to limit the time-period for which Defendant can seek records.
14 Plaintiff argues that he “has agreed all along to produce his relevant medical and mental health
15 records for a six-year period (03/01/2014 to present).” Dkt. #21 at 2. Plaintiff maintains that
16 this is the appropriate date because it is two years prior to the first alleged unlawful conduct and
17 is in accordance with a Washington State statute. *Id.* at 12 (citing WASH. REV. CODE
18 § 49.60.510(2)). On this record, the Court accepts this as a reasonable restriction on the scope
19 of discovery.

20 Defendant argues the date should be earlier because Plaintiff alleged that he “observed
21 discrimination” by Defendant as early as 2015. Dkt. #22 at 4. But this date refers to Plaintiff’s
22 observation of discrimination against third parties and does not provides a basis for inquiry into

23 _____
24 not explain why that information is not sufficiently protected by the protective order entered in
this case and the Court’s local rules. *See* Dkt. #18; LCR 5.2.

1 Plaintiff's contemporaneous medical and mental health records. Defendant further argues that
2 Plaintiff may have received treatment for unspecified mental health issues as early as 2010 or
3 2012. *Id.* But Defendant provides the Court no proof and Plaintiff represents that he did not
4 "need [] mental health diagnosis or treatment, and [had] no documented mental health issues for
5 at least four and a half years" proceeding his 2018 treatment for matters related to this case. Dkt.
6 #26 at 4. On this record—with no evidence that Plaintiff received any mental health treatment
7 between 2014 and 2018 or that the 2018 treatment was in any way related to his earlier mental
8 health condition or treatment—the Court finds good cause to restrict the relevant period to March
9 1, 2014 to present.

10 **E. Request for Order Pursuant to 5 U.S.C. § 552a(b)(11)**

11 After sending subpoenas to Plaintiff's treatment providers, some of whom are affiliated
12 with the United States Navy, Defendant received a communication from a Staff Judge Advocate
13 in the Judge Advocate General's Corps of the United States Navy. Dkt. #20 at ¶ 12. That
14 communication indicated that the release of Navy records would require a "judge-signed
15 subpoena or judge-signed court order to obtain the requested records." *Id.* at 112–15 (Navy
16 counsel citing 5 U.S.C. § 552a(b)(11)). Plaintiff argues that the Court should not order the Navy
17 to produce the records because the records may be available from Plaintiff. Dkt. #24 at 10–11.
18 The Court does not find the argument satisfactory at this point. Plaintiff has never averred that
19 he has all his existing medical and mental health records, has never averred whether all medical
20 and mental health records in his possession, custody, or control have been produced or whether
21 some were withheld in whole, and has baselessly redacted some of documents that he did
22 produce. Defendant may obtain the records directly from Plaintiff's treatment providers and the
23 Navy. To the extent necessary for the purposes of 5 U.S.C. § 552a(b)(11), the Court orders the
24

1 Navy to produce Plaintiff's medical and mental health records for the period of March 1, 2014
2 to present.

3 IV. CONCLUSION

4 Having considered the motions, the relevant briefing, the declarations and records
5 submitted in support thereof, and the remainder of the record, the Court hereby finds and
6 ORDERS:

- 7 1. Defendant's Motion to Compel Production of Plaintiff Renardo Robertson's Mental
8 Health and Medical Records; And for an Order to Produce Records From United States
9 Government (Dkt. #19) is GRANTED IN PART and DENIED IN PART as specified in
10 this Order. Plaintiff SHALL PRODUCE, within fourteen (14) days, medical and mental
11 health records in his possession for the period March 1, 2014 to present. Alternatively,
12 or in addition to, Defendant may subpoena records from Plaintiff's treatment providers
13 for the period of March 1, 2014 to present.⁷
- 14 2. Plaintiff's Motion to Quash Subpoenas for Medical Records to Plaintiff's Treatment
15 Providers, Motion to Stay, and Motion for Protective Order (Dkt. #21) is GRANTED IN
16 PART and DENIED IN PART as specified in this Order.

17 //

18 //

19 //

20 //

21 //

22
23 ⁷ The Court does note, as does Defendant, that "the collegial practice of [signing stipulations for
24 records releases] is fairly routine in this district." Dkt. #25 at 5 (quoting, with alterations, *Prue*
v. Univ. of Washington, Case No. C07-1859RSL, 2008 WL 3891466, at *2 (W.D. Wash. Aug.
19, 2008).

1 //

2 //

3 3. To the extent necessary for the purposes of 5 U.S.C. § 552a(b)(11), the Court ORDERS
4 the Secretary of the Navy and his designee to produce to Defendant Catholic Community
5 Services of Western Washington, within thirty (30) days of receipt of this Order any and
6 all mental health and medical records belonging or relating to Plaintiff Renardo
7 Robertson for the period March 1, 2014 to the present date.

8 DATED this 10th day of April, 2020.

9
10
11 

12 RICARDO S. MARTINEZ
13 CHIEF UNITED STATES DISTRICT JUDGE
14
15
16
17
18
19
20
21
22
23
24